No. 75-1273

In the Supreme Court of the United States

OCTOBER TERM, 1975

ERVIN COWSEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-8) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on February 6, 1976. The petition for a writ of certiorari was filed on Monday, March 8, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was denied due process of law by a four month pre-indictment delay.

2. Whether the trial court was required to give an "identification" instruction proposed by petitioner.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Illinois, petitioner was convicted of distributing heroin, in violation of 21 U.S.C. 841(a)(1).[1] He was sentenced to eight years' imprisonment, to be followed by six years' special parole. The court of appeals affirmed in a comprehensive opinion, upon which we rely.

The evidence showed that on the afternoon of October 28, 1974, undercover agents Louise Banks and John Lofton of the Illinois Bureau of Investigation, accompanied by Thomas Hundley and by an unidentified informant, drove to an apartment complex in East St. Louis to purchase heroin from petitioner (Tr. 6-11, 44-47). The agents met petitioner outside the apartment building. He told them that he had only "five dime bags" available. When agent Banks indicated that they wanted to buy more, petitioner replied that they could wait for his supplier, who would arrive soon (Tr. 11-12).

Petitioner entered the apartment building and returned a short time later with five packets of heroin, which he sold to Hundley for $50.00 (Tr. 13, 47-48). Petitioner returned to the apartment building, and the agents remained outside. After petitioner's supplier had come and gone, petitioner returned to the car and sold Hundley an additional seven packets of heroin for $70.00 (Tr. 15-16, 50).

ARGUMENT

1. Petitioner asserts that the delay of slightly more than four months between the commission of the offense on

[1]Petitioner and Thomas Hundley were charged with conspiracy to distribute heroin, in violation of 21 U.S.C. 841 (a)(1) and 846. Hundley could not be located and was not tried with petitioner, who was granted a judgment of acquittal on the conspiracy charge by the trial court. Hundley also has been charged with distribution of heroin, in violation of 21 U.S.C. 841(a)(1).

October 28, 1974, and the return of the indictment on March 12, 1975, deprived him of due process of law.

In *United States* v. *Marion*, 404 U.S. 307, 325, this Court stated that pre-indictment delay is excessive under the Due Process Clause only if the accused suffers actual prejudice and the government created the delay in order to obtain some tactical advantage. Petitioner does not allege, and the record does not show, that the government created a delay in this case to procure a tactical advantage. Indeed, the record shows without contradiction that the delay was attributable to the fact that agents Banks and Lofton were operating undercover and that their investigation lasted through February 1975 (Tr. 20). This investigation might have been jeopardized if petitioner had been indicted before March 1975.

As to prejudice, petitioner claims that because of the lapse he could not recall his actions on the day the offense was committed (Pet. 5). But a generalized claim of faded memory is not "enough to demonstrate that [petitioner] cannot receive a fair trial and to therefore justify the dismissal of the indictment." *United States* v. *Marion*, *supra*, 404 U.S. at 326. Petitioner also asserts that the testimony of Hundley became unavailable because of the delay (Pet. 5). Hundley, who was charged in the same indictment with petitioner, is a fugitive and has not been tried. There is no reason to believe that Hundley could have been apprehended if the indictment had been returned earlier. Nor is there any reason to believe that Hundley would give testimony helpful to petitioner. Hundley's unavailability consequently does not establish prejudice requiring the dismissal of the indictment.

Petitioner relies (Pet. 3-6) upon a line of cases in which the District of Columbia Circuit, in the exercise of its supervisory power, has required an especially thorough

consideration of claims of prejudice in narcotics cases involving the use of undercover agents, where the delay between commission of the offense and formal accusation exceeds four months. See, *e.g., Robinson* v. *United States,* 459 F.2d 847 (C.A. D.C.); *Dancy* v. *United States,* 395 F.2d 636 (C.A. D.C.). The District of Columbia Circuit stands alone in requiring a more rigorous review of claims of pre-accusation delay in narcotics cases.[2] See, *e.g., United States* v. *Thor,* 512 F.2d 811 (C.A. 5), certiorari denied, Nos. 75-285 and 75-5339, December 8, 1975; *United States* v. *Jackson,* 504 F.2d 337 (C.A. 8), certiorari denied, 420 U.S. 964; *United States* v. *Mallah,* 503 F.2d 971, 989 (C.A. 2), certiorari denied, 420 U.S. 995; *United States* v. *Weber,* 479 F.2d 331 (C.A. 8); *United States* v. *Silva,* 449 F.2d 145 (C.A. 1), certiorari denied, 405 U.S. 918.

The court below likewise refused to adopt the District of Columbia rule. We rely upon its analysis (Pet. App. 4):

> We decline to adopt a different rule for narcotics cases than for other cases. A claim of faded memory, the veracity of which can rarely be satisfactorily tested, can be plausibly asserted in almost any criminal case in which the defendant is not charged within a few weeks, at most, after the crime. The possibility or likelihood of faded memory has not, however, in itself, been viewed as prejudice that requires dismissal of an indictment, despite delays of much longer than the four and one-half months shown here. [Cita-

[2]This Court has characterized these cases (*Marion, supra,* 404 U.S. at 317, n. 8) as "a unique line of cases * * * concerning pre-indictment delay in narcotics cases where the Government relies on secret informers and (frequently) on single transactions. These cases take a more rigid stance against such delays, but they are based on the Court of Appeals' purported supervisory jurisdiction and not on the Sixth Amendment."

> tions omitted.] And, while defendants in narcotics cases often lack "desk pads and social calendars to assist them in determining where they were at a particular time many months before," *Powell* v. *United States,* 352 F.2d 705, 711 (D.C. Cir. 1965) (dissenting opinion), quoted in *Robinson* v. *United States, supra,* 459 F.2d at 852 n. 31, the same is true of defendants in other types of criminal cases. Any person is likely to have difficulty in remembering what he was doing on a particular date during the hours when many, if not most, crimes are committed. If the limitation period for prosecution were measured by the length of the defendant's memory of routine events, few crimes could be prosecuted.

Nor is this case an appropriate one for this Court to decide whether it will adopt, as a matter of its supervisory powers, the rule followed by the District of Columbia Circuit, for even under that court's rule the delay in this case was not excessive. When a claim of prejudice attributable to pre-accusation delay is raised, an important consideration is the nature of the identification testimony offered. That circuit is "particularly cautious when the only evidence [of identification] is the uncorroborated testimony of an undercover agent who had but a single brief encounter with the alleged offender" (*Robinson* v. *United States, supra,* 459 F.2d at 853; footnote omitted). In this case, however, the possibility of misidentification was slight. Two law enforcement officers observed petitioner for several minutes during three encounters on October 28, 1974 (Tr. 12, 14, 15, 25, 27, 30, 47-48, 56-57).[3]

[3]Petitioner appears to challenge the delay between the crime and the time when the agents identified him in a photographic display (Pet. 6). He does not challenge the in-court identifications, however. Nor does he argue that the photographic display or its timing was so impermissibly suggestive that it created a substantial likelihood of irreparable misidentification. See *Neil* v. *Biggers,* 409 U.S. 188. His attack upon the timing of the display consequently is unavailing.

2. Petitioner also contends (Pet. 6-7) that the trial court was required to give the following jury instruction, which he had proposed (Pet. App. 7):

> The evidence in this case raises the question of whether the defendant was in fact the criminal actor and necessitates your resolving any conflict or uncertainty in testimony on that issue.
>
> The burden of proof is on the prosecution with reference to every element of the crime charged and this burden includes the burden of proving beyond a reasonable doubt the identity of the defendant as the perpetrator of the crime charged.

The court of appeals properly held that a portion of the tendered instruction was neither accurate nor appropriate, and that the substance of the remaining portion was included in the court's instruction to the jury (Pet. App. 7-8):[4]

> The first paragraph of the tendered instruction incorrectly told the jury, "The evidence . . . raises the question" of identity "and necessitates your resolving any conflict or uncertainty in testimony on that issue." There was no conflict or uncertainty in the evidence on the issue of identity. The government's evidence was that [petitioner] was the seller of the heroin and [petitioner] offered no evidence to the contrary. A trial judge does not commit error by refusing to give an inaccurate instruction. * * * The

[4]Petitioner contends that this decision conflicts with the Seventh Circuit's own decision in *United States* v. *Hodges*, 515 F.2d 650. The court of appeals distinguished *Hodges*, observing that it requires the judge to give an "identification" instruction only if one is tendered in proper form, which did not occur here. In any event, any conflict between decisions of the same court of appeals would be for that court to resolve. *Wisniewski* v. *United States*, 353 U.S. 901, 902.

> jury, after hearing arguments of counsel for both sides which focused on the issue of identity, was instructed to "[c]onsider each witness's ability . . . to observe the matters as to which he or she has testified, and whether he impresses you as having an accurate recollection of these matters" [Tr. 83]. Further instructions advised the jury that the essential elements of the offense which had to be proved beyond a reasonable doubt were: "First, that the defendant did on October 28, 1974 distribute heroin, and second, that the defendant did so knowingly and intentionally" [Tr. 88-89]. Any reasonable jury could not have failed to understand that it could convict only if it found beyond a reasonable doubt that it was [petitioner] who committed the crime.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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